[Counsel listed on signature page].

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

In re: ACACIA MEDIA TECHNOLOGIES CORPORATION	Case No. 05-cv-01114 (JW) MDL No. 1665 **DEFENDANTS' STATEMENT IN SUPPORT OF PROPOSED BRIEFING SCHEDULE FOR §112 SUMMARY JUDGMENT MOTIONS**

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Pursuant to the Court's October 30, 2008 Order (D.I. 318), Defendants[1] submit this Statement in support of their proposed briefing schedule for Defendants' motions for summary judgment on §112 grounds since the parties were not able to agree on a new briefing schedule. The reason the parties were unable to agree is because, although Acacia insisted on a 33-day extension to its time for filing its opposition papers, thus pushing that date to November 26 (right before the holidays), Acacia refused to afford Defendants with a similar extension of time to file their reply papers. Acacia's ostensible reason for denying Defendants that which it demands for itself is that it was concerned about "protracting the case." (Ex. 3).[2] Acacia's position should be rejected, particularly in view of the fact that it was Acacia's request to vacate the briefing schedule, over Defendants' objections, that caused the protraction of the briefing schedule in the first instance. Further, it was Acacia's unilateral decision to stop working on its opposition papers that necessitates the 33-day extension Acacia says it requires.

To put Defendants' current proposed schedule in perspective, a brief history of how the parties arrived at this point is warranted. The parties agreed to a summary judgment briefing schedule for Defendants' §112 motions, which was adopted by the Court on May 27, 2008. (D.I. 282). The Court's May 27, 2008 Order expanded the time for briefing normally allowed under the local rules and did not restrict the page limits applicable to motions. Pursuant to that schedule, Defendants were provided with 6 weeks to file their opening briefs (i.e., until July 11, 2008); Plaintiff was provided with 15 weeks to file its opposition (i.e., until October 24, 2008); and Defendants were provided 11 weeks to file a reply (i.e., until January 9, 2008). Defendants filed their motions on July 11, 2008 as scheduled. The motions consisted of two substantive briefs, one by the Round 3

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[1] Defendants are those listed on the signature blocks.

[2] All numbered exhibits are attached to the *Declaration of Benjamin Hershkowitz In Support of Defendants' Statement In Support of Proposed Briefing Schedule For §112 Summary Judgment Motions*.

Defendants (D.I. 292) and one by the Satellite Defendants (D.I. 297), which, in substance, collectively totaled approximately 80 pages.[3]

Just before Plaintiff's opposition was due, on October 9, 2008, the Court issued an *Order to Show Cause Regarding Summary Judgment*. (D.I. 312). Although Acacia intended to oppose the *Order to Show Cause,* it nonetheless used the *Order to Show Cause* as the basis to move, over Defendants' objections, to vacate the agreed upon briefing schedule for Defendants' summary judgment motions. (D.I. 313). The Court granted Acacia's motion on October 16, 2008. (D.I. 316). Although it had just eight days remaining from entry of the October 16, 2008 Order to prepare its opposition under the prior schedule, Acacia now seeks 33 additional days to prepare its opposition, pushing the filing date back to November 26, 2008, right before the holidays. (*See* Ex. 1). Acacia's justification for this extension is that, although it was working with its expert when the October 16, 2008 Order issued, Acacia chose to then stop working with him, even though the expert was not going to be available again until the middle of November.

Despite the fact that the circumstances necessitating Acacia's request for a 33-day extension were brought about solely by Acacia itself, Defendants acquiesced to Acacia's requested extension. (*See id*. Exs. 2 and 4). Incredibly, however, while demanding this additional time for itself, Acacia sought to limit Defendants to the same amount of time between opposition and reply as was contemplated in the prior schedule. (*See* Exs. 1 and 3). That is the basis for the disagreement between Acacia and Defendants regarding the briefing schedule. Defendants' proposed schedule provides Plaintiff and Defendants *each* with 33 additional days to prepare their respective briefs. (*See* Ex. A). Plaintiff's opposition would be due on November 26, 2008, just as it has requested, while Defendants' (like Acacia) would also be afforded 33 more days (until March 16, 2009) to prepare their reply papers than was provided for under the original schedule.

Acacia has since backed off of its extreme position that it should receive a 33-day extension while Defendants should receive no extension whatsoever. Its position now, however, is that

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[3] Briefs were also submitted by the Round 2 Defendants (D.I. 291 and D.I. 296), and the Round 1 Defendants (D.I. 295 and D.I. 300), which predominantly sign on to the briefs identified above.

Defendants should receive a little under half the extra time that Acacia demands for itself. (*See* Ex. 5 and Ex. 7). This is simply the latest instance of Acacia's gamesmanship directed at subverting the briefing process on Defendants' summary judgment motions, and it should be rejected.[4]

First, although Acacia asserts that Defendants request a reciprocal extension solely for the purposes of delay, this assertion is unfounded given that, as noted above, it was Acacia's actions that led to the delay in the first place. Not only should Acacia not be heard to complain that it is prejudiced by a delay solely of its own making, but it has been completely unable to articulate why or how it is prejudiced by affording Defendants' the same extension of time it demands for itself.[5]

Second, in its motion to vacate, Acacia indicated that it planned to file an opposition brief of over 140 pages, nearly twice the length of Defendants' opening briefing. *See* Block Decl. ¶ 4 (D.I. 314). Although Defendants did not submit any expert declarations in support of their motions, Acacia has also stated that it will be submitting "a detailed expert declaration." *Id.* ¶ 5. Given the upcoming holiday season, a reciprocal extension is appropriate to allow Defendants time to respond to this voluminous submission. For example, Defendants will need to determine whether to respond to Acacia's expert declaration with their own expert declaration. If so, Defendants will then need to find and work with any such expert, which, in view of the holiday season, will likely not occur until after the new year. Defendants will also need to determine whether to depose Acacia's expert.[6] In view of these factors, Defendants propose the following schedule:

Plaintiff's Responsive Brief – November 26, 2008

Defendants' Reply Briefs – March 16, 2009

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[4] Acacia twice unsuccessfully moved that the Court not consider Defendants' summary judgment motions. Having failed at those attempts, Acacia now seeks to prejudice Defendants' preparation of their briefs.

[5] Defendants were willing to be flexible and give Acacia with the time Acacia needed provided Acacia extended Defendants that same courtesy. (Ex. 6). Acacia refused. (Ex. 7).

[6] Thus, while Acacia states that it needs the additional time because it has "checked with [its] expert, and he is unavailable to us until mid November" (Ex. 1), Acacia ignores the logistical, staffing and scheduling problems that its motion to vacate and other actions created for Defendants.

Unfortunately, Acacia has rejected this date for Defendants' Reply Briefs. And, as reflected in the correspondence, Acacia has taken such a heavy-handed approach, whereby it wants to dictate how much of an extension it gets *and* how much *less* of an extension Defendants get, that Defendants have no choice but to burden the Court with this matter.

Defendants respectfully request that the Court adopt the Proposed Schedule set forth in Exhibit A for completing the briefing on Defendants' §112 motions.

Dated: November 5, 2008

Respectfully Submitted,

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PROOF OF SERVICE

I hereby certify that:

1. I am a partner of the law firm Gibson, Dunn & Crutcher LLP. My business address is 200 Park Avenue, New York, New York 10166.

2. On November 5, 2008, I caused to be served DEFENDANTS' STATEMENT IN SUPPORT OF PROPOSED BRIEFING SCHEDULE FOR §112 SUMMARY JUDGMENT MOTIONS and DECLARATION OF BENJAMIN HERSHKOWITZ IN SUPPORT OF DEFENDANTS' STATEMENT IN SUPPORT OF PROPOSED BRIEFING SCHEDULE FOR §112 SUMMARY JUDGMENT MOTIONS upon the parties listed in the attached service list by transmitting via the United States District Court for the Northern District of California Electronic Case Filing Program by uploading the electronic files for each of the above listed documents.

3. On November 5, 2008, I also caused three courtesy copies of the above-mentioned documents to be delivered to the Chambers of the Honorable James Ware.

4. I caused copies of the above-described documents to be served by either electronic notification or postage prepaid first class mail upon the parties as listed in the attached service list.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: November 5, 2008

Respectfully Submitted,

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ATTACHMENT A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

In Re ACACIA MEDIA TECHNOLOGIES CORPORATION	Case No. C-05-0114JW **[PROPOSED] SCHEDULING ORDER FOR SUMMARY JUDGMENT BRIEFING** Judge: Honorable James Ware

IT IS HEREBY ORDERED that the schedule for the parties to file the remaining briefs in connection with Defendants' §112 motions is as follows:

Plaintiff's Responsive Brief – November 26, 2008

Defendants' Reply Briefs – March 16, 2009

IT IS SO ORDERED.

Dated: _______________, 2008.

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JAMES WARE
United States District Judge